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2 **ENERGY FACILITY SITE EVALUATION COUNCIL**

3 **STATE OF WASHINGTON**

4

5 In the Matter of Application) Application No.: 2006-01
6 No. 2006-01:)
7) RESPONSE BRIEF OF
8 ENERGY NORTHWEST) COLUMBIA RIVERKEEPER,
9) ROSEMERE NEIGHBORHOOD
PACIFIC MOUNTAIN) ASS'N, AND WILLAPA HILLS
ENERGY CENTER) AUDUBON SOCIETY

10

11 **INTRODUCTION**

12 In response to the plain requirements of Senate Bill 6001, codified as Chapter 80.80
13 Revised Code of Washington (RCW), Energy Northwest (Energy NW) has pleaded futility
14 and impossibility. Essentially, Energy NW requests that the Energy Facility Site
15 Evaluation Council (EFSEC) grant it a “free-pass” for violating the law. Finding no
16 support in law or fact, Energy NW rests its arguments on economic expedience and the
17 alleged unfairness of the statute. The Legislature has exercised its legitimate law making
18 power, however, to declare that Washington’s policy is to reduce greenhouse gas (GHG)
19 emissions to 50% of 1990 levels by 2050. RCW 80.80.020(1)(c). To reach this goal, the
20 Legislature, empowered by and accountable to the public, set out specific requirements for
21 baseload electric generating facilities and announced its preference for geologic or other
22 permanent sequestration in chapter 80.80 RCW. RCW 80.80.040(7) & (11). As the
23 primary implementers of this policy, EFSEC has a duty to uphold the rule of law by giving
24 full effect to these provisions. While there may be a balance to strike between making
25 affordable and stable electricity available for industries and consumers, on the one hand,
26 and protecting Washington’s interests from the impacts of global climate change, on the

1 other, in this case the Legislature has struck that balance. Chapter 80.80 RCW places the
2 burden on potential baseload electric generating facility owners and operators to
3 demonstrate that they will meet a performance measure the Legislature considers
4 achievable through specific means. In subsection (13), which is specific to proposed
5 facilities, the Legislature did not exempt PMEC from complying with the terms of the law.
6 All the parties agree that EFSEC should not issue a site certification conditioned on later
7 approval of Energy NW's carbon sequestration plan. Therefore, EFSEC should stay this
8 proceeding and condition future processing of Energy NW's application on the submission
9 of a legally sufficient carbon sequestration plan as required by RCW 80.80.040(13) and
10 (11).
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12 **RESPONSE**

13 **I. Rulemaking**

14 **I.a. EFSEC Should Not Proceed with Adjudication Until Rulemaking is** 15 **Complete.**

16 The structure of RCW 80.80.040(13) and (11) indicates that rulemaking is required.
17 Subsection (13) requires that Energy NW include "all of the requirements of subsection
18 (11)" in its carbon sequestration plan. RCW 80.80.040(13). Subsection (11) describes
19 certain criteria that must be included in the rules required by RCW 80.80.040(10), but
20 indicates that the criteria that should be "applied in evaluating the carbon sequestration
21 plan" are not limited to those enumerated in Subsection (11). RCW 80.80.040(11). Thus,
22 the statute requires that rules be in place before a carbon sequestration plan under
23 subsection (13) can be evaluated by EFSEC. Energy NW's arguments to the contrary are
24 without merit.

25 Energy NW argues that this adjudication cannot be delayed until rules are
26 promulgated because RCW 80.50.100 mandates that EFSEC propose a site certification
27 agreement to the Governor within 12 months of an application. Energy NW Opening Brief
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1 (ENW Br.) at 6 (citing RCW 80.50.100(1)). Energy NW, however, fails to include the
2 second clause of the cited sentence. The complete sentence provides: “[t]he council shall
3 report to the governor its recommendations as to the approval or rejection of an application
4 for certification within twelve months of receipt by the council of such an application, or
5 such later time as is mutually agreed by the council and the applicant.” *Id.* (emphasis
6 added). Energy NW’s omission is flagrant in light of the fact that Energy NW has already
7 requested one extension under RCW 80.50.100(1) during this EFSEC review process.

8 Energy NW compounds this error of omission by then arguing that since the
9 Legislature is assumed to be aware of existing laws, the Legislature must have assumed
10 that the 12-month provision would prevent EFSEC and Ecology from promulgating rules
11 before a decision would have to be made on Energy NW’s application. ENW Br. at 7-8.
12 Energy NW’s position ignores the sequel of its own logic: if the Legislature was aware of
13 the 12-month provision, the Legislature must also have been aware that the time period is
14 not an inflexible one, and can be extended through an agreement of the applicant and
15 EFSEC. Chapter 80.80 fails to alter chapter 80.50 because such alteration is not necessary
16 for Subsection (11) to require rulemaking prior to review of a carbon sequestration plan.
17 In short, there is no statutory barrier to EFSEC awaiting the promulgation of rules before
18 proceeding with this adjudication, the rules will provide necessary guidance in the
19 consideration of the GGRP, and the structure of chapter 80.80 RCW indicates that rules
20 are, in fact, required.

21 **I.b. Energy NW’s GGRP Fails to Address the Requirements of Subsection**
22 **(11).**

23 Energy NW claims that its Greenhouse Gas Reduction Plan (GGRP) satisfies the
24 statute because it “lists each element of RCW 80.80.040(11) and describes how PMEC will
25 comply with each requirement,” and sets out a chart indicating where the GGRP mentions
26 each specific requirement. ENW Br. 8. While Riverkeeper does not dispute that the
27 GGRP mentions each requirement of Subsection (11), the whispers to which Energy NW
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1 cites fail to satisfy the six enumerated criteria as explained in Riverkeeper’s opening brief,
2 as well as the briefs of the Counsel for the Environment, Department of Ecology, and
3 Department of Community, Trade and Economic Development (hereinafter, State Parties
4 Br.) and the NW Energy Coalition, Washington Environmental Council, and Sierra Club
5 (hereinafter Coalition Br.). A mere mention that a statutory requirement exists cannot
6 satisfy the law. If it could, the statutory requirements would become meaningless
7 procedures. EFSEC should not interpret the law to make it meaningless. *See Sleasman v.*
8 *City of Lacey*, 159 Wash. 2d 639, 646, 151 P.3d 990, 994 (2007) (“Full effect must be
9 given to the legislature’s language, with no part rendered meaningless or superfluous”)
10 (citing *Whatcom County v. City of Bellingham*, 128 Wash. 2d 537, 546 (1996)). EFSEC
11 must thus reject Energy NW’s claim that the GGRP “included” the requirements of
12 subsection (11) by simply stating the requirements in the GGRP.
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15 **II. Energy NW’s GGRP is not a Legally Sufficient Carbon Sequestration**
16 **Plan.**

17 In arguing that RCW 80.80.040 does not require it to submit a plan to permanently
18 sequester its greenhouse gas emissions, Energy NW repeatedly misstates the law. *See*
19 ENW Br. at 8-9. Energy NW claims that Subsection (13) “allows PMEC to offset its
20 greenhouse gas emissions by ‘purchasing verifiable greenhouse emissions reductions from
21 an electric generating facility located within the western interconnection.’” *Id.* The law
22 specifically provides that the option to purchase emissions reductions is available only if
23 and when Energy NW fulfills the first steps in a multi-step process, as described below.
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25 *See* RCW 80.80.040(13).
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1 **Step 1:** Energy NW must submit a carbon sequestration plan that includes all of
2 the requirements in RCW 80.80.040(11). *Id.*

3 **Step 2:** EFSEC must contract with the Department of Ecology for review of the
4 plan. RCW 80.80.040(12)(a), (b).

5 **Step 3:** EFSEC must consider the adequacy of the plan for sequestration in its
6 adjudicative proceeding. RCW 80.80.040 (12)(b).

7 **Step 4:** EFSEC must propose a final site certification agreement to the Governor
8 which incorporates findings regarding the adequacy of the carbon
9 sequestration plan. *Id.*

10 **Step 5:** The Governor must grant Energy NW a final site certification agreement
11 approval under Chapter 80.50. RCW 80.80.040(13).

12 **Step 6:** Energy NW must make a good faith effort to implement the carbon
13 sequestration plan developed in Step 1. *Id.*

14 **Step 7:** If implementation of the carbon sequestration plan attempted in Step 6 was
15 not feasible, Energy NW must submit documentation to EFSEC that
16 demonstrates the steps taken to implement the plan and evidence of the
17 barriers to successful implementation. *Id.*

18 **Step 8:** Energy NW must then notify EFSEC that it will implement the part of the
19 carbon sequestration plan developed in Step 1 that allows PMEC to meet
20 the greenhouse gas performance standard through purchasing verifiable
21 greenhouse gas emissions reductions from facilities in the western
22 interconnection. *Id.*

23 Contrary to Energy NW's assertion, Energy NW does not simply get to choose
24 between meeting the performance standard through sequestration or through purchasing
25 greenhouse gas reductions. The statute plainly spells out a series of steps the applicant
26 must take. Energy NW's desire to implement the law in a manner it finds easier, less
27 costly or more favorable cannot change the plain meaning of the statute. EFSEC should
28 not countenance Energy NW's cries of impossibility and futility because Energy NW has
29 failed to provide the requisite information to support its technical infeasibility argument.
30 Energy NW's attempts to contravene the clear policy preference of the Washington

1 Legislature, that is, sequestration first, must fail. As described in the Opening Briefs of
2 Riverkeeper, the State parties, and the Coalition, the GGRP lacks adequate information to
3 make a determination that the plan will ensure that PMEC will satisfy the greenhouse
4 gases emissions performance standard, and fails to include provisions that satisfy the
5 requirements of RCW § 80.80.040(11). Thus, the GGRP is not a legally sufficient carbon
6 sequestration plan.
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8 **II.a. Chapter 80.80 Requires Submission of a “Carbon Sequestration Plan,”**
9 **not an “Adaptive Management Plan,” and, Regardless, Energy NW’s**
10 **GGRP is Not an “Adaptive Management Plan.”**

11 Energy NW argues that its GGRP is “legally sufficient” because it presents a
12 reasonable approach that is appropriate in light of scientific uncertainty. ENW Br. at 9-11.
13 To support its argument, Energy NW seeks to create a “tension between the goals of
14 chapter 80.80 RCW and the current state of scientific uncertainty surrounding geologic
15 sequestration.” ENW Br. at 9. No such tension exists. Energy NW attempts to
16 characterize geologic sequestration as scientifically uncertain to justify what it calls
17 “adaptive management.” Energy NW offers no genuine demonstration that “scientific
18 uncertainty” would prevent formulation of a plan for geologic sequestration at the site. In
19 fact, Energy NW has failed to undertake the necessary analysis of the geologic resources at
20 the site to make a determination. Nothing in chapter 80.80 RCW allows Energy NW to
21 unilaterally declare that carbon sequestration is infeasible. A determination of technical
22 feasibility is, at its core, an objective analysis, which can and must be reviewed in detail by
23 regulators. Chapter 80.80 RCW is not a voluntary statute, and Energy NW cannot simply
24 “opt out” by declaring that the science is too uncertain. Moreover, there is no “scientific
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1 uncertainty” about the technology necessary, as a general matter, to geologically sequester
2 carbon dioxide.¹

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4 Even if great scientific uncertainty existed, Energy NW cannot avoid the statutory
5 requirement to develop a plan with provisions for carbon sequestration within five years of
6 commercial operation in favor of the type of “adaptive management” it proposes. Energy
7 NW’s “adaptive management” approach is to develop a sequestration plan in the future if,
8 during one of its five-year reviews in its “Plan Compliance Program,” “there is a
9 determination that geological sequestration is technically and economically feasible, as
10 defined by this plan.” GGRP at 23. Energy NW claims that this is an “adaptive
11 management” approach, but nothing could be further from adaptive management than
12 Energy NW’s plan to plan in the future.
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14 In support of its claim that this is an “adaptive management” approach, Energy
15 NW’s explains how adaptive management techniques have been applied to attaining and
16 maintaining water quality standards, greenhouse gas mitigation plans, and stormwater
17 permits. ENW Br. 11. Energy NW concludes that “it is wholly appropriate to condition
18 GHG Plan approval on a monitoring and evaluation process that can lead to changes in
19 operational conditions.” ENW Br. at 11. Even if it is appropriate to condition approval on
20 a monitoring and evaluation process, Energy NW has never proposed a specific monitoring
21 and evaluation process. In short, the “adaptive management plan” proposed by Energy
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25 ¹ As discussed in detail in Riverkeeper and the Coalition’s Opening Briefs, geologic
26 sequestration is currently occurring on a large scale at several locations and is currently
27 proposed at others. Riverkeeper Br. at 32- 34; Coalition Br. at 6 – 18. Energy NW claims
28 that geological sequestration is not currently economically or technically feasible, pointing
to an “extensive discussion of the current status of geologic sequestration” in the GGRP.
ENW Br. at 9. This “extensive discussion” consists of six pages of largely unsupported
and vague assertions about carbon sequestration technology.

1 NW does not require that Energy NW take any action to meet the objective of the
2 applicable statute - carbon sequestration.

3 Adaptive management is not a method to avoid taking action. Rather, adaptive
4 management is a way of treating management actions, usually in a natural resources
5 context, as experiments so that a resource manager can learn from the prior management
6 actions in deciding what actions to take in the future. *See generally* D.R. Marmorek,
7 D.C.E. Robinson, C. Murray and L. Grieg, *Enabling Adaptive Forest Management*,
8 National Commission on Science for Sustainable Forestry (2006) at 1 (describing adaptive
9 management as, generally, “a rigorous approach for learning through deliberately
10 designing and applying management actions as experiments.”).² Under an adaptive
11 management approach, a plan must be developed to achieve an objective, benchmarks
12 must be set to gauge progress toward the objective, and actions must be taken to achieve
13 the benchmarks. Ongoing monitoring must be used to assess progress toward the
14 objective, and corrective actions must be taken if progress is not evident or the benchmarks
15 are not achieved.

16 The objective by which any carbon sequestration plan must be measured is whether
17 geologic sequestration will commence within five years of commercial operation. Energy
18 NW’s “adaptive management” plan, however, does not endeavor to reach this objective
19 through actions taken to reach benchmarks and monitoring and evaluation of the effects of
20 the action. Rather, Energy NW plans, every five years, to evaluate whether the objective is
21 possible, decide whether the objective is possible, and if it determines the objective is not
22 possible, decide whether the objective is possible, and if it determines the objective is not
23 possible, decide whether the objective is possible, and if it determines the objective is not
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25 possible, decide whether the objective is possible, and if it determines the objective is not
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27 ² Available at:

28 http://ncseonline.org/CMS400Example/uploadedFiles/NCSSF/NCSSF%20Project%20D1_Adaptive%20Forest%20Mgmt%20Final%2018%20May%2006.pdf (last visited November 4, 2007).

possible at that time, do nothing until the next five year period expires. At each subsequent five-year interval, Energy NW commits to engage in the same exercise of deciding whether to take any action. During this period, Energy NW's plan does not require them to take any action toward the ultimate objective – carbon sequestration. Energy NW's adoption of the term “adaptive management” to describe its GGRP does not change the fact that Energy NW's submittal contains no plan for action leading to carbon sequestration within five years of commercial operation.

II.b. The GGRP Fails to Work in Unison with the Carbon Mitigation Provisions of chapter 80.70 RCW.

Energy NW depends upon the dictionary definition of “unison,” and the Legislature's failure to choose the word “complement” for support for its contention that PMEC can meet the 20% carbon mitigation requirement of chapter 80.70 RCW by satisfying the greenhouse gas performance standard of chapter 80.80 RCW. Chapter 80.70 RCW requires that a fossil fuel-fired electric generation facility mitigate 20% of its total carbon dioxide emissions. RCW § 80.70.020(4). Chapter 80.80 RCW requires that a baseload electric generation facility meet a greenhouse gases emissions performance standard of 1100 pounds of greenhouse gas per megawatt hour. RCW § 80.80.040(1)(a).

Energy NW relies on “logic” to conclude that “greenhouse gas reduction projects that comply with the requirements of both statutes should work toward compliance with both statutes.” ENW Br. at 12. As described in Riverkeeper's opening brief, Energy NW's contention means that one statute would supersede the other by implication, a result which Washington law does not permit. *Anderson v. Dept. of Corrections*, 159 Wn.2d 849, 858-59, 154 P.3d 220 (2007); *See also* Riverkeeper Br. at 29-30. Moreover, Energy NW's interpretation would lead to inequitable results for cleaner power facilities, an outcome

1 which contravenes the intent of both statutes – to reduce pollution contributing to global
2 climate change. EFSEC must harmonize the provisions of chapters 80.70 and 80.80 by
3 requiring Energy NW to comply with both by mitigating 20% of total carbon dioxide
4 emissions through methods enumerated in chapter 80.70 RCW, and by reducing
5 greenhouse gas emissions to below the performance standards through methods
6 enumerated in chapter 80.80 RCW. The reductions or mitigation used to satisfy one
7 statute cannot be used to satisfy the other, except where Energy NW actually reduces
8 emissions through sequestration, in which case “total carbon dioxide emissions” subject to
9 chapter 80.70 RCW’s 20% mitigation requirement would decrease.
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12 **II.c. The Greenhouse Gas Reduction Plan does not Constitute a "Good**
13 **Faith" Effort to Comply with the Statutory Requirement to Implement**
14 **a Plan for the Geological Sequestration or Other Approved**
15 **Sequestration of Greenhouse Gases.**

16 Energy NW’s wholly deficient GGRP fails to meet the requirements of a
17 sequestration plan in RCW 80.80. The plan either meets the requirements or it does not.
18 The question of “good faith” is only relevant to a facility’s future implementation of an
19 approved sequestration plan.

20 Energy NW contends that its GGRP is a “good faith demonstration of compliance”
21 because the GGRP states that Energy NW will spend \$60 million and contains a “Plan
22 Compliance Program” requiring Energy NW to evaluate technologies and economic
23 feasibility repeatedly in the future. ENW Br. at 12-13. Energy NW fails to address the
24 pertinent question: whether the plan complies with the statute. The fundamental problem
25 here is that the law requires a “good faith effort to implement the sequestration plan,” and
26 Energy NW has not submitted a carbon sequestration plan.
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1 Even if only a “good faith” effort is required, which is not what the law says.
2 Energy NW’s commitments do not rise to the level of a good faith effort to implement a
3 carbon sequestration plan. First, the \$60 million is not sufficient to implement actual
4 carbon sequestration. The \$50 million investment in carbon capture technology is
5 obviously necessary for carbon sequestration to occur, but carbon capture without a means
6 to store or transport for storage does not constitute a good faith effort to implement a
7 carbon sequestration plan. Moreover, the \$10 million promised for a site evaluation should
8 be spent before a carbon sequestration plan is developed. Thus, spending money on a site
9 evaluation cannot be deemed a showing of “good faith effort to implement the
10 sequestration plan.”
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13 **II.d. Energy Northwest has not Submitted a “Carbon Sequestration Plan,”**
14 **and Implementation of the Greenhouse Gas Reduction Plan Submitted**
15 **by Energy Northwest would not Constitute a “Good Faith Effort to**
16 **Implement [the Law]” Because the Plan Fails to Address Necessary**
17 **Elements.**

18 Energy NW’s GGRP fails to satisfy the criteria in Subsection (11) and is not a
19 “sequestration plan.” Thus, implementation of the GGRP could not demonstrate a “good
20 faith effort to implement the sequestration plan” as required by Subsection (13).³ Energy
21 NW’s arguments that it can determine now, before developing a realistic and technically
22 supported plan to sequester carbon, and before receiving a final site certification, that
23 implementation of the carbon sequestration plan is infeasible are premised on erroneous
24 interpretations of the statute.
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27 ³ Energy NW’s arguments that its financial assurances, monitoring, penalty, offset
28 purchase and notice and comment provisions are sufficient add nothing to the GGRP.
Therefore, rather than restating the arguments in its Opening Brief, Riverkeeper refers
EFSEC to the points made in the Opening Briefs in response to those assertions.

1 First, Energy NW claims, with regard to when the determination of infeasibility can
2 occur, that “[t]he statute does not expressly address the timing of Energy Northwest’s
3 determination.” ENW Br. at 14. On the contrary, the statute states:

4 [a] project under consideration by [EFSEC] by July 22, 2007, that
5 receives final site certification agreement approval under chapter
6 80.50 RCW shall make a good faith effort to implement the carbon
7 sequestration plan. If the project owner determines that
8 implementation is not feasible, the project owner shall submit
documentation of that determination to [EFSEC].

9 RCW 80.80.040(13). Thus, the statute expressly addresses timing and plainly mandates
10 that an applicant 1) receive a final site certification agreement approval, and 2) make a
11 good faith effort to implement the carbon sequestration plan before determining that
12 implementation is not feasible. The entire structure of chapter 80.80 is built around the
13 carbon sequestration plan. Through chapter 80.80 RCW, the Legislature has expressed its
14 preference that greenhouse gases from energy generation be reduced through sequestration.
15 The statute is not susceptible to the meaning that Energy NW attempts to assign - that
16 Energy NW can determine that sequestration is infeasible prior to final site certification
17 agreement approval and good faith efforts to implement the sequestration plan. The plain
18 meaning controls. *State, Dept. of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash. 2d 1,
19 9-10, 43 P.3d 4, 9-10 (2002). Even if the statute were ambiguous, however, Energy NW’s
20 contention that it can make a determination of infeasibility before submitting a facially
21 legally sufficient carbon sequestration plan is flatly unreasonable.
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25 The crux of Energy NW’s argument is an appeal to EFSEC to excuse Energy NW’s
26 violation of the law because requiring compliance with the law is simply unfair. *See* ENW
27 Br. at 16. Energy NW claims that the Legislature’s inclusion of Subsection (13)
28 demonstrates that the Legislature intended for PMEC to be permitted, constructed and

1 operated regardless of Energy NW's compliance with chapter 80.80 RCW. ENW Br. at
2 15. This appeal must fail.

3 The Legislature could have easily exempted Energy NW's compliance with chapter
4 80.80 RCW altogether. The Legislature also could have specified that PMEC be allowed
5 to meet the greenhouse gases performance standard through mitigation without attempting
6 a good faith effort to implement a plan including provisions for carbon sequestration
7 within five years of commercial operation. As Energy NW notes, "[c]ourts will presume
8 that the legislature did not engage in vain and useless acts and that some significant
9 purpose or object is implicit in every legislative enactment." ENW Br. at 16 (citations
10 omitted). We agree. The plain language of the statute controls.

13 Energy NW does not point to any language in chapter 80.80 RCW, or Subsection
14 (13) in particular, that excuses Energy NW from compliance with the requirement to
15 submit a carbon sequestration plan that complies with the requirements of Subsection (11).
16 Energy NW cannot do so because the statute clearly requires Energy NW to submit a
17 carbon sequestration plan including provisions for carbon sequestration within five years
18 of commencing commercial operation. RCW 80.80.040(11)(b). It is a longstanding tenet
19 of the law that "difficulty of compliance does not invalidate the law." *See State v. Gilliam*,
20 81 Wash. 186, 191, 142 P. 470, 472 (1914) (describing that compliance with a law
21 requiring full publicity of individuals aiding and contributing to a campaign to recall a
22 public official may be difficult given the large numbers of people involved in circulating
23 recall petitions).

26 Energy NW also claims that requiring compliance with the plain meaning of the
27 law will impermissibly lead to "absurd" results. The result here, however, is far from
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1 absurd. As demonstrated in Riverkeeper and the Coalition’s Opening Briefs, sufficient
2 scientific information currently exists about carbon sequestration to allow Energy NW to
3 formulate a plan after investing in reasonable due diligence. *See* Riverkeeper Br. at 32-34;
4 Coalition Br. at 8-18. Indeed, several domestic sources are currently proposing large-scale
5 sequestration at IGCC plants like PMEC. *See Id.* There is nothing absurd about requiring
6 Energy NW to do the same.
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8 Moreover, requiring compliance with chapter 80.80 RCW does not make
9 permitting PMEC impossible, as Energy NW claims. Chapter 80.80 RCW allows Energy
10 NW to implement a plan to purchase emissions reductions to meet the emission standard
11 after submitting a legally sufficient plan, receiving a final site certification, making good
12 faith efforts to implement the sequestration plan, and then demonstrating the technical
13 infeasibility of sequestration. Energy NW may be permitted as soon as it submits a legally
14 sufficient carbon sequestration plan. Energy NW does not contend that submission of a
15 legally valid sequestration plan and good faith efforts to implement the plan are actually
16 impossible. Instead, Energy NW claims that if EFSEC requires Energy NW to take these
17 actions “PMEC could not obtain the partners and financing necessary to proceed with the
18 facility.” ENW Br. at 16. Energy NW’s financial problems, however, do not override the
19 requirements of the statute. *See Byers v. Board of Clallam County Com’rs*, 84 Wash. 2d
20 796, 802, 529 P.2d 823, 828 (1974) (where county contended that preparation of an EIS for
21 rezoning action would be a “difficult, if not impossible, task,” the Court held that “[t]he
22 requirements of SEPA may not be thwarted merely because compliance therewith is
23 difficult”).
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1 **II.e. Energy NW Can, and Must, Provide “Full and Sufficient**
2 **Documentation” Now.**

3 Energy NW depends upon its “adaptive management” approach to ensure that
4 Energy NW will provide sufficient technical support for its plan “[i]f and when
5 sequestration becomes feasible.” ENW Br. at 18. Energy NW claims that it has submitted
6 full and sufficient documentation of its decision not to create a carbon sequestration plan at
7 this time. *Id.* Energy NW’s documentation, however, consists primarily of Energy NW’s
8 bald assertions that sequestration is infeasible. Energy NW has not undertaken the steps
9 necessary to determine the feasibility of sequestration at the site. Energy NW’s
10 documentation is thus necessarily insufficient. *See* Declaration of John Stormon submitted
11 in support of the State Parties Br. (outlining the documentation that the Department of
12 Ecology expects in a carbon sequestration plan).

13 **II.f. Energy NW is Requesting Site Certification for a Multi-Fuel IGCC**
14 **Plant, Not a Natural Gas Combined Cycle Facility.**

15 As Riverkeeper explained in its Opening Brief, PMEC is not being sited as a
16 natural gas combined cycle facility. If it were, the facility would be limited in its air
17 permits and final site certification to firing natural gas. Here, the site certification
18 application clearly demonstrates that Energy NW proposes to build an IGCC facility that is
19 capable of firing a variety of fuels, including coal and petcoke, and Energy NW must meet
20 the pre-site certification requirements applicable to a facility that will burn coal and
21 petcoke. These requirements include submitting a legally sufficient carbon sequestration
22 plan pursuant to chapter 80.80 RCW. While chapter 80.80 RCW itself would be satisfied
23 by commercial operation on natural gas, assuming that the emissions are lower than the
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1 greenhouse gases performance standard, the site certification agreement process mandates
2 that the facility be sited according to the fuel characteristics of the proposed facility.

3 For example, when proposing a site certification agreement EFSEC implements
4 provisions of the Washington State Implementation Plan (SIP) related to the prevention of
5 significant deterioration (PSD) of air quality codified in WAC 173-400-113. WAC 463-
6 39-095 (as approved by EPA in 61 Fed. Reg. 25,791 (May 23, 1996)). The PSD
7 regulations require that a proposed new source employ the best available control
8 technology (BACT), and satisfy a variety of other requirements. *See* WAC 173-400-113.
9 Determining BACT requires a case-by-case analysis of the characteristics of the flue gas
10 from a facility. These characteristics are determined primarily by the fuel characteristics.
11 Thus, control technologies and emissions profiles associated with one fuel may not be
12 readily transferable to another fuel.⁴

13 For example, Low-NOx burners are typically used with Natural Gas Combined
14 Cycle (NGCC) plants to reduce emissions of nitrogen oxides (NOx). The fuel
15 characteristics of syngas produced from coal or petcoke may interfere with the use of Low-
16 NOx burners. As Energy NW explains in its BACT analysis, “the[] differences [between
17 natural gas and syngas] alter the combustion kinetics of the burner flame in a manner that
18 prevents the use of lean-premix combustion techniques, which are the defining feature of
19 Low-NOx burner design.” PMEC EFSEC App. at Appendix B, p. B-1-14.

20 Similarly, the differences in syngas and natural gas implicate the applicability of
21 selective catalytic reduction (SCR), a leading NOx control technology for NGCC facilities,
22 to PMEC. Again, the Energy NW BACT analysis explains, “syngas contains reduced
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1 sulfur compounds ... [a]fter combustion, some of the oxidized sulfur will form
2 ammonium-sulfur salts in the presence of the ammonia reagent that can impact the SCR
3 catalyst and equipment downstream.” *Id.* at p. B-1-16. Control technologies that are
4 proven for NGCC facilities may thus present different challenges when applied to syngas-
5 fired facilities, and the differences between natural gas and syngas will have profound
6 impacts on the requisite BACT analysis and eventual BACT emissions limits.
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8 Moreover, when firing natural gas, gasification is not necessary. If gasification is
9 not necessary, the equipment and facilities associated with transporting, unloading,
10 processing and gasifying coal and petcoke are unnecessary. If PMEC proposes to operate
11 on natural gas to satisfy the greenhouse gases emissions performance standard, the very
12 nature of the necessary facilities changes. For example, Energy NW proposes to build a
13 railroad spur for delivery of coal to the facility requiring destruction of a high quality 8.86-
14 acre wetland. PMEC EFSEC App. at Appendix C, pp. 1, 7, 9. The loss of this resource is
15 unnecessary if the facility will fire natural gas only.
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18 Clearly, choice of fuel has significant impacts on how the site and plant should be
19 designed. The air quality impact, available emissions control options, and the need to fill
20 wetlands are dictated by the choice of fuel. If Energy NW proposes to meet the
21 greenhouse gases emissions performance standard by firing natural gas “indefinitely,” the
22 facility must be sited as a NGCC rather than IGCC facility.
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28 ⁴ See PMEC EFSEC App. at Appendix B, p. B-1-15 (discussing the differences between natural gas and syngas as follows: “[s]yngas differs from natural gas in heating value, gas composition, and flammability characteristics”).

1 **III. Energy NW Must Provide a Facially Adequate Carbon Sequestration**
2 **Plan Before the Adjudicative Process May Begin, and Further**
3 **Processing of Energy NW’s Application Should Be Halted.**

4 Energy NW claims that submission of a legally sufficient carbon sequestration plan
5 cannot be “made a precursor to the balance of the adjudicative process.” ENW Br. at 20.
6 First, Energy NW claims that no statutory authority exists to require a legally sufficient
7 carbon sequestration plan before the adjudicative process begins. Second, Energy
8 Northwest claims that EFSEC cannot halt the adjudicative proceedings “while other parties
9 review [its] carbon sequestration plan” because it is entitled to timely review of its site
10 certification application under RCW 80.50.100(1). ENW Br. at 20. Energy NW also
11 contends that nothing in Washington law requires that Energy NW include a carbon
12 sequestration plan as part of its application, and even if such submission were required,
13 Energy NW can amend the plan throughout the adjudication process up to 30-days
14 following the conclusion of the adjudication. Energy NW’s arguments are without merit.

17 As Riverkeeper explained in its Opening Brief, EFSEC’s rules require that an
18 applicant include measures in the site certification application to minimize and mitigate
19 adverse impacts of a proposed project. WAC 463-60-085. EFSEC’s rules also require
20 that an applicant identify all applicable air pollution control standards and describe the
21 means to assure compliance with emission standards. WAC 463-60-312(1). EFSEC’s
22 Rules require that applications be complete and reflect the best available current
23 information and intentions of the applicant. WAC 463-60-116(1). Amendments to a
24 pending plan must be submitted 30 days before an adjudicative hearing. WAC 463-60-
25 116(2). These provisions, taken together, provide ample legal support for delaying the
26 adjudicative process until a facially adequate plan is presented.
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Moreover, as the State parties pointed out in their Opening Brief, the carbon sequestration plan must be submitted prior to adjudication because EFSEC must contract with the Department of Ecology to review the plan. State Parties Br. at 28 (citing RCW 80.80.040(12)(a), (b)). The Department of Ecology stated that it cannot review the PMEC GGRP because it is vague and lacks necessary detail. *See Id.* at 29. Therefore, contrary to Energy NW's assertions, the carbon sequestration plan required under chapter 80.80 RCW must be submitted as part of the facility application and must be facially adequate such that it can be reviewed by the Department of Ecology prior to the commencement of the adjudicative hearing.

Energy NW's position also implicates important policy considerations. Energy NW's proposed procedure would deprive EFSEC's and other parties of the opportunity to meaningfully analyze and comment upon a proposed carbon sequestration plan. The adjudicative proceedings must provide for a forum where EFSEC and other parties can recommend and stipulate to substantive amendments to a legally sufficient site certification application. EFSEC should not allow the adjudicative proceedings to become an elementary forum where the parties spend valuable time simply pointing out applicants' gross failures to include required application elements.

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1 **IV. Submission of a Legally Sufficient Carbon Sequestration Plan is**
2 **Required before a Site Certification Agreement Can be Proposed to the**
3 **Governor.**

4 Energy NW maintains that EFSEC can conditionally authorize PMEC's
5 construction in reliance on Energy NW's agreement to submit required components of the
6 carbon sequestration plan after the site certification agreement is authorized. ENW Br. at
7 23. Energy NW bases its claim on past EFSEC actions and the belief that chapter 80.80
8 RCW does not limit EFSEC's authority to "impose binding conditions on an applicant."
9 *Id.* Because Energy NW's claims are completely unsubstantiated, EFSEC should dismiss
10 Energy NW's proposition that EFSEC can conditionally authorize PMEC.
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12 RCW § 80.80.040(12)(b) states, "For facilities under its jurisdiction, [EFSEC] shall
13 . . . consider the adequacy of sequestration or the plan in its adjudicative proceedings
14 conducted under RCW § 80.50.090(3), and incorporate specific findings regarding the
15 adequacy in its recommendation to the Governor under RCW § 80.50.100." This Section
16 specifically mandates that EFSEC consider the adequacy of the carbon sequestration plan
17 that an applicant submits and that it also incorporate these findings in its recommendation
18 to the Governor. Furthermore, the express language of this Section in no way authorizes
19 EFSEC to submit a draft site certification agreement to the Governor conditioned on later
20 approval of a carbon sequestration plan. For these reasons, EFSEC cannot conditionally
21 authorize the construction of PMEC simply because in narrow circumstances EFSEC has
22 issued conditional agreements.
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25 Furthermore, the fact that RCW § 80.80.040(12)(b) and RCW § 80.80.040(13) do
26 not explicitly state that EFSEC cannot issue conditional agreements does not mean that
27 EFSEC is free to issue conditional agreements when an applicant fails to satisfy the
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1 specific requirements of an applicable statute. The purpose of the adjudicative proceedings
2 is to provide a forum for EFSEC and other parties to analyze and comment on elements of
3 the site application, including a carbon sequestration plan that has been reviewed by the
4 Department of Ecology. Through those analyses and arguments, EFSEC's
5 recommendation for approval or denial of the application to the Governor will be legally
6 defensible and protective of the public interest. If EFSEC can grant conditional agreement
7 upon the promise of submission of a carbon sequestration plan, EFSEC will not be able to
8 incorporate the findings of its analysis in its recommendation to the Governor. The
9 backward logic of issuing conditional agreements for construction based upon the promise
10 of later submission of a carbon sequestration plan renders parts of the climate change law
11 inoperative.

12 Moreover, the parties agree that EFSEC should determine whether the GGRP
13 complies with chapter 80.80 RCW before proposing a site certification agreement to the
14 Governor, albeit for different reasons. *See* ENW Br. at 24-25; State Parties Br. at 32-33;
15 Coalition Br. at 34-35; Riverkeeper Br. at 40-41. Thus, EFSEC should not issue a
16 conditional site certification agreement that would allow construction of PMEC without
17 first concluding that Energy NW has submitted a valid carbon sequestration plan and that
18 implementation of that plan will comply with applicable legal requirements.

23 CONCLUSION

24 For the reasons stated in this Response, Columbia Riverkeeper, Rosemere
25 Neighborhood Association and Willapa Hills Audubon Society respectfully request that
26 EFSEC declare that the Greenhouse Gas Reduction Plan fails to satisfy chapters 80.80 and
27 80.70 RCW, require Energy NW to complete its application by submitting a facially
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1 adequate carbon sequestration plan, and stay the adjudicative proceeding until such time as
2 Energy NW has satisfied this requirement.

3 DATED: November 7, 2007.
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5 Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served the foregoing document upon all parties of record in this proceeding, by authorized method of service pursuant to WAC 463-30-120(3), Council Order 832 of September 26, 2007, allowing service on all parties via electronic mail, and the waivers submitted by each party consenting to service via electronic mail.

DATED: November 7, 2007


Brett VandenHeuvel
Staff Attorney
Columbia Riverkeeper